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Supreme Court of the United States

OCTOBER TERM, 1940

No. 778

NEW JERSEY WORSTED MILLS,

Petitioner,

against

OLIVE RIPLEY GNICHTEL, HENRY A. SCHWEDES and FEDERAL TRUST COMPANY, Executors of the Will of Edward E. Gnichtel.

PETITION FOR A WRIT OF CERTIORARI TO THE THIRD CIRCUIT COURT OF APPEALS AND BRIEF IN SUPPORT THEREOF

LAURENCE ARNOLD TANZER,
Counsel for Petitioner.

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against

OLIVE RIPLEY GNICHTEL, HENRY A. SCHWEDES and FEDERAL TRUST COMPANY, Executors of the Will of Edward E. Gnichtel.

PETITION FOR A WRIT OF CERTIORARI TO THE THIRD CIRCUIT COURT OF APPEALS.

This is a petition for a writ of certiorari to the Third Circuit Court of Appeals to review its decision affirming the judgment of the District Court for the District of New Jersey, in favor of defendants.

Statement.

Petitioner, after filing its income and profits tax returns for its fiscal years ending March 31, 1918, and March 31, 1919 (hereinafter referred to as 1918 and 1919 respectively), and paying the tax disclosed thereby (R. 52-54), computed at the rates prescribed by the Revenue Acts of 1917 and 1918 (R. 4, 5, 29, 30), applied to the Commissioner of Internal Revenue for "special assessment" of its profits taxes for those years under section 210 of the Revenue Act of 1917 and sections 327 and 328 of the Revenue Act of 1918 (R. 54).

The Commissioner allowed the application April 7, 1923, after careful consideration and review (R. 12, 14, 18, 60, 54, 55), and found and determined and declared of record that the tax if determined without the benefit of section 327 of the Revenue Act of 1918 would, owing to abnormal conditions affecting the capital or income of petitioner, work upon petitioner an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of said section and the tax computed by reference to the representative corporations specified in section 328 (R. 5, 6, 31). He found that, based upon the experience of a group of representative concerns engaged in a like or similar trade or business to that of petitioner, petitioner had been overassessed $401,577.98 for 1918 and $108,328.53 for 1919 (R. 54, 60, 13). He issued and delivered to petitioner certificates of overassessment in those amounts (R. 55, 60, 14, 18), and the amounts thereof were refunded to petitioner with interest (R. 55).

On March 25, 1924, the Commissioner by letter notified petitioner that "a reexamination" had been made of petitioner's application for special assessment "together with all other evidence in the case", and that the determination theretofore made was "erroneous"; and that the tax liabilities had been recomputed, for 1918 under the relief provisions and for 1919 under the ordinary provisions, disclosing additional tax of $119,668.67 for 1918 and $108,328.53 for 1919, which would be listed for assessment immediately (R. 55, 60, 22-27). In pursuance of this redetermination the Commissioner assessed against petitioner additional taxes in said amounts (R. 55) and notices and demands for payment thereof were served upon petitioner by the collector (R. 56).

The Commissioner did not disclose to petitioner the facts, evidence, or basis upon which such redetermination was based nor give petitioner an opportunity to be heard before making the reassessments (R. 8, 32). The record

shows, however, that the redetermination was made upon a reconsideration of the original application, and not upon any claim of fraud or mistake (R. 31, 32, 22, 23, 63, 94, 95, 110-112).

Petitioner filed claims for abatement of the additional assessments (R. 56, 65-70), which were rejected by the Commissioner (R. 56). Thereafter petitioner filed a petition with the United States Board of Tax Appeals to review the action of the Commissioner (R. 56, 73-79), but the petition was dismissed by the Board on the Commissioner's plea of want of jurisdiction on the ground that the assessment complained of had been made prior to June 2, 1924, the effective date of the Revenue Act of 1924, which created the Board (R. 56, 57, 80, 81).

The collector issued warrants of distraint for the additional assessments (R. 57), and collected the amounts thereof, in part by applying as a credit sums due petitioner for overpayment of other taxes, and the balance by petitioner's check delivered under protest April 29, 1926 (R. 57, 58, 82, 83, 84).

Upon consideration of claims for refund filed by petitioner February 20, 1928, the Commissioner made a third computation of the 1918 tax under the relief provisions and found that in the prior redetermination petitioner had been overassessed $38,644.85 (R. 58, 93-97, 103), which was refunded to petitioner (R. 58). He adhered to the redetermination in so far as it revoked the allowance of special assessment for 1919 (R. 95). Accordingly, on July 15, 1929, he disallowed the claim for refund for 1918 for $81,023.82, the balance of tax paid over the amount refunded (R. 58), and on December 26, 1930, he rejected the claim for refund for 1919 (R. 58, 59).

This action, to recover the taxes paid as aforesaid, was commenced July 13, 1931 (R. 59), against the collector who made the collection, and who was then no longer in office. He died during the pendency of the action, and his executors were substituted as defendants (R. 118, 119, 38).

The case came on for hearing on motions by both parties for summary judgment, based on the pleadings and stipulations of fact (R. 40-44). The District Court rendered judgment for defendants (R. 44, 2), and the Circuit Court of Appeals affirmed (R. 140).

Jurisdiction.

The jurisdiction of this Court is invoked under section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. Code, Tit. 28, § 347).

The judgment of the Circuit Court of Appeals was entered December 9, 1940.

Questions Presented.

1. Has the Commissioner of Internal Revenue power to retake by summary process moneys lawfully refunded to a taxpayer in the exercise of discretionary power conferred upon the Commissioner by Congress?

2. Does such retaking by summary process not subject to judicial review and without disclosure of the grounds or basis therefor constitute a taking of the taxpayer's property without due process of law?

Reasons Relied on for Allowance of Writ.

1. The question decided below, of the power of the Commissioner of Internal Revenue to retake by summary process moneys theretofore lawfully refunded by him to a taxpayer, is an important question of federal law which has not been, but should be, settled by this Court.

2. The decision below is in direct conflict with the decision of the Sixth Circuit Court of Appeals in *Woodworth* v. *Kales*, 26 F. (2d) 178, holding that the Commis-

sioner is without authority to reconsider and revoke his determinations of fact or discretion in the absence of fraud or mistake, and is likewise in conflict with the decision of the same court in *Austin Co.* v. *Commissioner*, 35 F. (2d) 910, recognizing that rule of law as applicable to special assessment cases and supplementing it only to the extent of holding that the burden of proof is on the taxpayer to show the absence of fraud or mistake—the existence of which is negatived by the admitted facts in the present case.

3. The decision below appears to be in conflict with a long line of decisions in this Court, establishing the principle that the determination of an administrative officer in a matter which is by law subject to his final determination cannot be reopened by himself or by anyone else (*Kaufman* v. *U. S.*, 11 Ct. Cl. 659, 670, affirmed 96 U. S. 567; *U. S.* v. *Schurz*, 102 U. S. 378; *Noble* v. *Union River Logging R.R. Co.*, 147 U. S. 165, 176, 177; *Ballinger* v. *Frost*, 216 U. S. 240, 250; *Lane* v. *Watts*, 234 U. S. 525, 540; *Kern River Co.* v. *U. S.*, 257 U. S. 147, 151, 152; *Great Northern Railway Co.* v. *Steinke*, 261 U. S. 119, 130; *West* v. *Standard Oil Co.*, 278 U. S. 200, 218, 219; *Butte, Anaconda & Pacific Railway Co.* v. *U. S.*, 290 U. S. 127, 142, 143).

4. The decision below appears to be in conflict with the decisions of this Court in *Bonwit Teller & Co.* v. *U. S.*, 283 U. S. 258, 264, 265, and *Daube* v. *U. S.*, 289 U. S. 367, holding that delivery to and acceptance by a taxpayer of a certificate of overassessment creates an account stated and vests in the taxpayer new rights not subject to recall by the Commissioner.

5. The decision below appears to be in conflict with the decisions of this Court holding that one acquiring rights as a result of administrative action cannot be deprived of them without due process of law (*Garfield* v. *U. S. ex*

rel. Goldsby, 211 U. S. 249, 262; *Noble* v. *Union River Logging Co.,* 147 U. S. 165, 176, 177), and that an exercise of administrative discretion not based on evidence and findings open to contest and subject to judicial review does not constitute due process of law (*Interstate Commerce Commission* v. *Louisville & Nashville Railroad Co.,* 227 U. S. 88, 91-94; *Crowell* v. *Benson,* 285 U. S. 22, 48; *Southern Railway Co.* v. *Virginia ex rel. Shirley,* 290 U. S. 190, 197, 198; *West Ohio Gas Co.* v. *Public Utilities Commission,* 294 U. S. 63, 68, 69; *Ohio Bell Telephone Co.* v. *Public Utilities Commission,* 301 U. S. 292, 302-304; *Morgan* v. *U. S.,* 304 U. S. 1, 14, 15, 18, 19).

WHEREFORE it is respectfully submitted that the prayer of this petition should be granted.

LAURENCE ARNOLD TANZER,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION.

A statement of the grounds on which the jurisdiction of this Court is invoked, and a statement of the case, are contained respectively at page 4 and at pages 1-4 of the petition, *supra.*

Opinions Below.

The opinion of the District Court (R. 44-51) is reported at 31 F. Supp. 908. The opinion of the Circuit Court of Appeals, rendered December 9, 1940 (R. 131-140), is reported at 116 F. (2d) 338.

ARGUMENT.

I

The Commissioner of Internal Revenue was without power to retake by summary process the moneys theretofore lawfully refunded to petitioner in the exercise of the discretionary power conferred upon him by Congress.

1. This Court has never directly passed upon the power of the Commissioner to retake by summary process moneys lawfully refunded to a taxpayer. It has held that an erroneous or illegal refund can be recovered by an action brought for that purpose (*U. S.* v. *Wurts,* 303 U. S. 414, 415, 416). But it has never held that the Commissioner of Internal Revenue has power to retake by summary process moneys lawfully refunded. *Burnet* v. *Porter,* 283 U. S. 230, relied upon in the opinion below (R. 136), does not establish that proposition. The dictum in

that case[1], sustaining the Commissioner's power to retake moneys refunded under an interpretation of the law later found to be erroneous, has apparently been limited by *U. S.* v. *Great Northern Railway Co.*, 287 U. S. 144, 153, to cases where public officers "act illegally", as distinguished from cases where they exercise judgment and discretion.

2. The allowance of petitioner's claim for special assessment was the exercise of a final administrative discretion not subject to court review (*Williamsport Wire Rope Co.* v. *U. S.*, 277 U. S. 551), and is therefore subject to the rule established by numerous decisions of this Court cited at page 5, *supra*, that the determination of an administrative officer in a matter which is by law subject to his final determination cannot be reopened by himself or by anyone else.

3. The decision below departs from that rule, and also disregards the decisions of this Court in *Bonwit Teller & Co.* v. *U. S.*, 283 U. S. 258, 264, 265 (and the cases there relied on of *U. S.* v. *Kaufman*, 96 U. S. 567; *U. S.* v. *Real Estate Savings Bank*, 104 U. S. 728, and *Bank of Greencastle's case*, 15 Ct. Cl. 225), and *Daube* v. *U. S.*, 289 U. S. 367, holding that upon delivery to the taxpayer of a certificate of overassessment, the Commissioner's official action is completed and his jurisdiction is exhausted.

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[1] *Burnet* v. *Porter* turned upon the taxpayer's right as a matter of law to a deduction claimed by him. The Commissioner at first allowed the deduction and later changed his ruling and disallowed it. The Board of Tax Appeals sustained the Commissioner, but the Third Circuit Court of Appeals reversed it, upholding the taxpayer's right to the deduction. Petition to this Court for certiorari was filed by the Commissioner, not by the taxpayer. This Court upheld the Commissioner's view of the law and reversed on the merits. The question of the Commissioner's power to redetermine was not presented by petition for certiorari, by assignment of error or by briefs or argument, and was not before this Court for decision (*Le Tulle* v. *Scofield*, 308 U. S. 415, 421, 422).

4. The decision below is in direct conflict with the decisions of the Sixth Circuit Court of Appeals in *Woodworth* v. *Kales,* 26 F. (2d) 178, where the court, anticipating the distinction made by this Court in *U. S.* v. *Great Northern Railway Co., supra,* held that the Commissioner may recall his action where he has failed to follow the law, but not where he has exercised a discretion conferred upon him by law, and also held, contrary to the ruling below (R. 136), that power to recall his exercise of judgment or discretion was not granted by implication by the "compromise provisions" (Revenue Act of 1921, § 1312; Revenue Act of 1924, § 1006; Revised Statutes, § 3229).

A dictum in that case to the effect that the Commissioner might recall an exercise of discretion for fraud or mistake, though contrary to the rulings of this Court cited *supra,* became the basis of the decision by the same court in *Austin Co.* v. *Commissioner,* 35 F. (2d) 910, certiorari denied 281 U. S. 735.[2] In that case and in *Page* v. *Lafayette Worsted Co.,* 66 F. (2d) 339, certiorari denied 290 U. S. 692, the Commissioner's power to recall his allowance of special assessment was sustained, against strong dissent in each case, on a holding that the existence of new facts justifying such action was to be presumed in the absence of evidence to the contrary; and the same result was reached by the Court of Claims in *Oak Worsted Mills* v. *U. S.,* 36 F. (2d) 529, new trial denied 38 F. (2d) 699, certiorari granted limited to another point 281 U. S. 77, affirmed on that other point 282 U. S. 409, and in *Taft Woolen Co.* v. *U. S.,* 38 F. (2d) 704. But no decision prior to the one here sought to be reviewed has sustained a recall of discretionary action based, as here, on a mere reconsideration, and in the absence of fraud or mistake or other new facts.

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[2] *Austin Co.* v. *Commissioner, supra,* did not overrule *Woodworth* v. *Kales, supra,* but the latter is still regarded as law in the Sixth Circuit. *Boyne City Lumber Co.* v. *Doyle,* 47 F. (2d) 772 (D. C. Mich.); *Routzahn* v. *Brown,* 95 F. (2d) 766, 770 (C. C. A. 6).

II

The collection by summary process without disclosure of the grounds or basis therefor and without opportunity for court review constituted a taking of petitioner's property without due process of law.

1. The decision below departs from the principle established by numerous decisions of this Court, cited at pages 5, 6, *supra,* that a taking of property by administrative action without disclosure of the grounds therefor and opportunity for court review, violates the guaranty of due process of law.

2. The holding below that because a redetermination of an ordinary tax liability is not an unconstitutional deprivation of the taxpayer's property, the same is true of the recall of an exercise of discretion (R. 139), is a *non sequitur.* In the former case due process is afforded by the disclosure to the taxpayer of the grounds of the action taken and the right to court review after payment (*Phillips* v. *Commissioner,* 283 U. S. 589, 596, 597), both of which are wanting in the present case.

3. The argument of the Court below, that the absence of the right to court review of the retaking of moneys refunded does not deprive the taxpayer of his constitutional rights any more than the absence of such right with respect to the original action on the special assessment application (R. 139), disregards the vital distinction established by the decisions of this Court between the situation existing before and after rights are acquired through the exercise of administrative discretion (*Johnson* v. *Towsley,* 13 Wall. 72; *Noble* v. *Union River Logging Co.,* 147 U. S. 165, 176, 177; *Garfield* v. *U. S., ex rel. Goldsby* 211 U. S. 249, 262; *White* v. *Chin Fong,* 253 U. S. 90, 92, 93; *Daube* v. *U. S.,* 289 U. S. 367, 372).

4. The holding below that the moneys refunded to petitioner were subject to be retaken without due process of law because the refund was "a dispensation of the sovereign's grace" (R. 139) is, we submit, unsound. Special assessment was not a bounty or gratuity, but an act of justice: it was "a special method of determining the tax for those cases in which the ordinary method of assessment would result in grave hardship or serious inequality" (*Williamsport Wire Rope Co.* v. *U. S.*, 277 U. S. 551, 558). Even in the case of a bounty or gratuity, when once granted, the proceeds become the grantee's property, of which he cannot be deprived without due process of law (*Hines* v. *U. S. ex rel. Marsh*, 105 F. [2d] 85, 89, 90, and note 6 [App. D. C.]; *U. S. ex rel. Lyons* v. *Hines*, 103 F. [2d] 737, 745, 746 [App. D. C.]; *U. S.* v. *Kearns*, 115 F. [2d] 552, 555 [C. C. A. 10]; cf. *Butte, Anaconda & Pacific Railway Co.* v. *U. S.*, 290 U. S. 127, 142; *U. S.* v. *Carpenter*, 84 F. [2d] 813, 814 [C. C. A. 10]).

5. The Court below misapprehended petitioner's position. Petitioner does not claim, as the Court below supposes (R. 134, 138), "a vested right to the unwarranted as well as to the warranted portion of the refund", but only the elementary right to a day in court upon the Commissioner's claim that the refund, or any part thereof, was unwarranted.

6. The holding of the Court below that a taxpayer applying for discretionary relief against excessive taxes, without right to court review of the exercise of the discretionary power, impliedly agrees that if the discretion is exercised in his favor he will hold any moneys paid to him subject to arbitrary retaking by the Commissioner at his uncontrolled whim at any time before the statute of limitations runs (R. 139, 140), abandoning his constitutional right to a day in court before his property is taken, is a *non sequitur* and runs counter to the principles established by the decisions of this Court cited above. Such

a ruling would open the door to unlimited possibilities of corruption or oppression, and would defeat the very purpose of "due process—the protection of the individual against arbitrary action" (*Ohio Bell Telephone Co.* v. *Public Utilities Commission,* 301 U. S. 292, 302).

7. No decision of this Court sustains power in any public officer to take a person's property without disclosure of the grounds or basis for the taking, and without opportunity to defend against it—"a power possessed by no other officer, administrative body or tribunal under our government" (*Interstate Commerce Commission* v. *Louisville & Nashville Railroad Co.,* 227 U. S. 88, 91).

8. As governmental powers are expanded, it becomes of increasing importance to maintain and enforce the safeguards afforded by the due process clause against oppressive or arbitrary action (cf. *Morgan* v. *U. S.,* 304 U. S. 1, 14, 15).

CONCLUSION

A writ of certiorari should be granted as prayed in the petition.

Respectfully submitted,

LAURENCE ARNOLD TANZER,
Counsel for Petitioner.

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REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

LAURENCE ARNOLD TANZER,
Counsel for Petitioner.

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Supreme Court of the United States

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REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Respondents' brief (pp. 6, 7) cites *Botany Worsted Mills* v. *U. S.*, 278 U. S. 282, as holding that the so-called "closing agreement" provisions by implication authorize the Commissioner to reopen any determination where there has been no closing agreement. That case does not so hold: it holds that a closing agreement may be made only by the method provided by statute; it does not hold that the Commissioner may not complete his action and exhaust his jurisdiction in the absence of a closing agreement (cf. *Castell* v. *U. S.*, 98 F. [2d] 88, 91 [C. C. A. 2], certiorari denied 305 U. S. 652).

II.

At pages 11 and 12 of respondents' brief, respondents argue the question as to the Collector's liability for the entire amount of the additional assessments collected by him, partly in cash and partly by application of a credit in favor of Gera Mills, a subsidiary of petitioner—a question which the Court below expressly refused to consider

(R. 133, 134) and which is therefore not presented by the present petition.

(a) The statement at page 12 of respondents' brief that "the Collector here did not, as in *U. S.* v. *Bertelsen & Petersen Co.*, 306 U. S. 276, make the original collection of the taxes" is erroneous. The Collector here did make the collection and did make the credit which he accepted in part payment. He demanded of plaintiff payment of the entire amount (R. 56, 57) and issued warrants of distraint for its collection (R. 57). After obtaining permission from the Commissioner to do so he applied the overassessment as a partial payment on the collection which he was making, and collected the balance in cash (R. 33, 35, 57, 58, 84, 117, 118, 122-127).

(b) *Lowe Bros. Co.* v. *U. S.*, 304 U. S. 302, does not, as argued at page 11 of respondents' brief, hold that the Collector is not liable for taxes so collected. In that case, the credit was made by the Commissioner, not as in this case by the Collector, and the Collector was held not liable because "no suit will lie unless he collected the tax"; or, as explained in *U. S.* v. *Bertelsen & Petersen Engineering Co.*, 306 U. S. 276, 281, because the Collector "did not make or authorize the credit".

(c) In any view, the claim that the Collector was not liable for the portion collected by credit, even if sustained, would not, as argued at page 11 of respondents' brief, support the decision below. Concededly, that claim constitutes no defense as to the $66,876.12 paid in cash, but applies only to so much of the tax ($133,853.50) as was paid by credit (R. 35).

III.

A writ of certiorari should be granted as prayed in the petition.

Respectfully submitted,

LAURENCE ARNOLD TANZER,
Counsel for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 778

NEW JERSEY WORSTED MILLS, PETITIONER

v.

OLIVE RIPLEY GNICHTEL, HENRY A. SCHWEDES AND FEDERAL TRUST COMPANY, EXECUTORS OF THE WILL OF EDWARD E. GNICHTEL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the District of New Jersey (R. 44–51) is reported in 31 F. Supp. 908. The opinion of the Circuit Court of Appeals for the Third Circuit (R. 131–140) is reported in 116 F. (2d) 338.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 9, 1940. (R. 140.) The

petition for a writ of certiorari was filed February 21, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The Commissioner of Internal Revenue granted taxpayer's application for special assessment of its excess profits tax liability for the years 1918 and 1919 and made refunds pursuant to Section 210 of the Revenue Act of 1917 and Sections 327 and 328 of the Revenue Act of 1918. The question is whether the Commissioner may thereafter, within the period of limitations, correct his determinations and assess excess profits tax deficiencies equal to all or a part of the money refunded.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 13–21.

STATEMENT

The facts were stipulated (R. 52–130) and those presently material may be summarized as follows:

The taxpayer is a New Jersey corporation. The original defendant, Edward E. Gnichtel (hereinafter called the "Collector"), was at all times important for the purposes of this action Collector of Internal Revenue for the Fifth District of New Jersey. After the institution of this action Gnich-

tel died; respondents are the executors under his will.

The taxpayer filed its income and excess profits tax returns for the years 1918 and 1919 under the Revenue Acts of 1917 and 1918, respectively, and paid the taxes due as shown thereon. Thereafter it applied to the Commissioner of Internal Revenue for a redetermination of its excess profits taxes for each of the two years upon the basis of the relief provisions contained in Section 210 of the Revenue Act of 1917 and Sections 327 and 328 of the Revenue Act of 1918. (R. 52–54.)

The Commissioner granted the taxpayer's application and, as a result of a special computation, determined an overassessment for each of the years in question in a substantial amount. The decision was communicated to the taxpayer by letter from the Commissioner dated April 7, 1923, and the amounts of the overassessments were refunded with interest. (R. 54.)

By letter of March 25, 1924, the Commissioner advised the taxpayer that the redetermination of its profits tax liability was erroneous and that a recomputation of the taxes for 1918, under the relief provisions, and for 1919, under the ordinary provisions of the pertinent Revenue Acts, disclosed an additional tax liability for each year, for which assessments against the taxpayer were made immediately. Following the Commissioner's formal rejection of a claim for abatement of

the additional assessments, the taxpayer petitioned the Board of Tax Appeals for a review of the Commissioner's decision. The Commissioner filed a plea in bar challenging the jurisdiction of the Board on the ground that the taxes in controversy had been assessed prior to the passage of the Revenue Act of 1924 which created the Board of Tax Appeals. The Board subsequently entered an order dismissing the petition for lack of jurisdiction. The taxpayer did not petition for a court review of the Board's decision. (R. 54–57.)

The taxpayer paid the additional assessments, using for this purpose, with the Commissioner's approval, a tax credit in favor of a wholly owned subsidiary (Gera Mills) and a check to the order of the Collector for the balance. The taxpayer filed claims for refund of the additional taxes, to which the Commissioner responded in due course, stating that a further computation of the taxpayer's tax liability for the year 1918 under the relief provisions of the Revenue Acts developed an overpayment of taxes by the taxpayer for that year but that the application for a special assessment for the year 1919 had been properly disallowed. The overassessment for 1918 was refunded to the taxpayer with interest and the claim for refund for 1919 was formally rejected (R. 57–59; 116–123).

The present action was instituted for the recovery of the net amount of profits taxes paid by

the taxpayer for the years 1918 and 1919, over and above the Commissioner's original special assessments. Pursuant to cross-motions for summary judgment (R. 40–42, 43–44), the District Court decided that the Commissioner had power to make a redetermination under the special assessment provisions of the Revenue Acts of 1917 and 1918 and that such a redetermination, like an original determination pursuant to those provisions, was not subject to review by the courts. Accordingly, judgment was entered for the respondents and the taxpayer appealed (R. 44–51). The Circuit Court of Appeals affirmed the judgment of the District Court (R. 140).

ARGUMENT

1. Section 210 of the Revenue Act of 1917 (*infra*, p. 13) and Sections 327 and 328 of the Revenue Act of 1918 (*infra*, pp. 14–15) authorize the Commissioner, in his discretion, to make a special computation of excess profits taxes in certain situations where application of the ordinary excess profits tax provisions is not feasible or would work hardship. The Commissioner's determination as to whether the special computation is warranted, as well as the special computation itself, are not subject to review by the courts. *Williamsport Co.* v. *United States*, 277 U. S. 551; *Duquesne Steel Foundry Co.* v. *Commissioner*, 41 F. (2d) 995 (C. C. A. 3rd), affirmed *per curiam*, 283 U. S. 799.

The issue here is simply whether, after the Commissioner has determined that a special computation is warranted and has made such a special computation, he may within the period of limitations alter that determination and either disallow the special computation entirely or change the actual computation previously made. This question is not peculiar to Section 210 of the 1917 Act and Sections 327 and 328 of the 1918 Act, since the statutory procedure for the assessment and collection of income and excess profits taxes is the same, whether special computation is allowed or the ordinary provisions are applied.

The revenue statutes themselves clearly indicate the answer to the question. Section 3229 of the Revised Statutes, in effect prior to 1921, provided for the binding compromise of a tax controversy by the Commissioner with the approval of the Secretary of the Treasury. For the first time in the 1921 Act there appeared, as Section 1312 (*infra*, p. 20), a "closing agreement" provision for giving binding effect to any determination and assessment, whether followed by payment of a deficiency, or refund or credit. Such an agreement made by the Commissioner must, like an offer in compromise, receive the approval of the Secretary of the Treasury. The clear implication from these express provisions for securing a determination binding upon the Commissioner is that a determination, such as that here involved, which is not embodied in a compromise or in a closing agree-

ment, is not binding until the running of the period of limitations makes it so.

With the exception noted below, this has been the consistent ruling of the courts. *Botany Mills* v. *United States,* 278 U. S. 282; *Burnet* v. *Porter,* 283 U. S. 230, which expressly approved the analysis of the Circuit Court of Appeals for the Third Circuit in *McIlhenny* v. *Commissioner,* 39 F. (2d) 356; *Sharpe* v. *Commissioner,* 107 F. (2d) 13 (C. C. A. 3d), certiorari denied, 309 U. S. 665; *L. Loewy & Son* v. *Commissioner,* 31 F. (2d) 652 (C. C. A. 2d); *Holmquist* v. *Blair,* 35 F. (2d) 10, 12–13 (C. C. A. 8th); *Oak Worsted Mills* v. *United States,* 36 F. (2d) 529 (C. Cls.), new trial denied, 38 F. (2d) 699, certiorari denied on this point, 281 U. S. 717, affirmed on other grounds, 282 U. S. 409; *Taft Woolen Co.* v. *United States,* 38 F. (2d) 704 (C. Cls.), certiorari denied on this point, 281 U. S. 717, affirmed on other grounds, 282 U. S. 409; *Page* v. *Lafayette Worsted Co.,* 66 F. (2d) 339 (C. C. A. 1st), certiorari denied, 290 U. S. 692; *Austin Co.* v. *Commissioner,* 35 F. (2d) 910 (C. C. A. 6th), certiorari denied, 281 U. S. 735; *Levy* v. *Commissioner,* 48 F. (2d) 725 (C. C. A. 9th); *Baumgartner* v. *Commissioner,* 51 F. (2d) 472 (C. C. A. 9th); *Champ Spring Co.* v. *United States,* 47 F. (2d) 1 (C. C. A. 8th), certiorari denied, 283 U. S. 852.

Woodworth v. *Kales,* 26 F. (2d) 178 (C. C. A. 6th), relied upon by the petitioner, is to the con-

trary. The *Kales* case, however, antedated all of the decisions cited above, and has plainly been overruled. The subsequent decision of the Circuit Court of Appeals for the Sixth Circuit in *Austin Co.* v. *Commissioner,* in effect reverses the result of the *Kales* case. It is significant that in *Oak Worsted Mills* v. *United States, Taft Woolen Co.* v. *United States, Page* v. *Lafayette Worsted Co.,* and *Austin Co.* v. *Commissioner,* all *supra,* which are direct authority in support of the decision below, petitions for writs of certiorari were denied despite asserted conflict with the *Kales* case.

Petitioner relies on the holding in *Bonwit Teller & Co.* v. *United States,* 283 U. S. 258, reiterated in *Daube* v. *United States,* 289 U. S. 367, 370, that a certificate of over-assessment issued by the Commissioner creates an account stated and may give rise to a new cause of action with a new term of limitations. That holding is in no way inconsistent with the decisions above cited, since the mere existence of an account stated does not give finality to the Commissioner's action. As pointed out in *Daube* v. *United States, supra,* at 371, quoting from *United States* v. *Kaufman,* 96 U. S. 567, 575, such an "account stated" is valid only until "impeached for fraud or mistake." Since the Commissioner may impeach for mistake an "account stated" represented by a certificate of over-assessment, he may on like principle assess a deficiency despite an earlier refund, upon determination that

the refund was erroneously made. The ruling in the *Bonwit Teller* case, made in connection with the running of the period of limitations, is "not to be extended through an enlargement of the concept of an account stated by latitudinarian construction." *Daube* v. *United States, supra,* at 373. It certainly has no direct application here for this is a suit against the Collector and an action on an account stated does not lie against the Collector. *Moses* v. *United States,* 61 F. (2d) 791 (C. C. A. 2d), certiorari denied, 289 U. S. 743.

Little need be said concerning the numerous cases cited by petitioner (Pet. 5, 8) for the proposition that an administrative decision finally made is irrevocable and may not be reopened or revised even though the statutory limitation period has not expired. The obvious differences between those cases and the present one are adequately discussed in the opinion below (R. 137–138). None of them involved statutory provisions comparable to those here involved.

2. There is no merit in petitioner's contention that it has been denied due process of law. The correction or reversal of an assessment, though annoying and perhaps, at times, financially embarrassing to the taxpayer, is *per se* no denial of due process. Cf. *Botany Mills* v. *United States,* 278 U. S. 282; *Burnet* v. *Porter,* 283 U. S. 230, and other cases cited with them at p. 7, *supra.* When in the instant case the petitioner requested special

assessment and received a refund, it knew, or should have known, in view of Section 1312 of the 1921 Act then in force, that unless a closing agreement was obtained, a correction or reversal of the Commissioner's determination was possible. If there is any hardship in the Commissioner's reassessment, it lies only in the lack of a right to court review; in this respect, the hardship is no more severe than it is with respect to the Commissioner's original action on an application for special assessment, which is also not subject to judicial review. Cf. *Welch* v. *Obispo Oil Co.*, 301 U. S. 190; *Heiner* v. *Diamond Alkali Co.*, 288 U. S. 502.

Two reasons conclusively demonstrate that petitioner can point to no unconstitutional confiscation. In the first place, the right to court review was voluntarily abandoned by the petitioner when it requested special assessment. *United States* v. *Henry Prentiss & Co.*, 288 U. S. 73, 87–88; *Michigan Iron & Land Co.* v. *United States*, 10 F. Supp. 563 (C. Cls.); *Central Iron & Steel Co.* v. *United States*, 6 F. Supp. 115 (C. Cls.), certiorari denied, 293 U. S. 563. In the second place, the purpose of the special assessment provisions is to relieve taxpayers from hardship which would be imposed by the fixed rates and provisions generally applicable; in other words, it involves a special dispensation or bounty. In the instant case, the final result of the Commissioner's actions was to reduce peti-

tioner's excess profits tax liability for 1918 by some $320,000 below the usual rates, and to leave the usual rates in effect for 1919. As this Court said in *Lynch* v. *United States,* 292 U. S. 571, 577:

> Pensions, compensation allowances and privileges are gratuities. They involve no agreement of parties; and the grant of them creates no vested right.

Since the taxpayer had no vested right in the special dispensations granted by the original exercise of the Commissioner's discretion, it could not complain of a violation of constitutional right when those bounties were subsequently wholly or partly withdrawn. *Lynch* v. *United States, supra; Frisbie* v. *United States,* 157 U. S. 160, 166.

3. There is an additional ground to support the decision below which the court did not feel called upon to consider. The entire amount claimed for the year ending March 31, 1918, and all but $55,498.85 of the amount claimed for the year ending March 31, 1919, was paid by a tax credit belonging to Gera Mills, a subsidiary of the taxpayer (R. 57, 116–119). This Court has specifically held that the Collector is not liable for taxes so collected. *Lowe Bros. Co.* v. *United States,* 304 U. S. 302. Obviously, the Collector must make proper book entries when a credit is authorized by the Commissioner, since the Collector keeps the taxpayer's account. But, unlike a cash collection, this involves "a mere ministerial act,

[which] could subject the collector to no personal liability." *Lowe Bros. Co.* v. *United States, supra,* at 306. The credit instructions given the Collector in the instant case (R. 126–127) left only ministerial acts to be performed.

The Collector here did not, as in *United States* v. *Bertelsen & Petersen Co.,* 306 U. S. 276, make the original collection of the taxes and consequently no cause of action could be stated against him for the original overpayment. And in view of the *Lowe Bros. Co.* decision, none could be stated against him for the alleged overpayment which resulted from the credit. See also *Routzahn* v. *Reeves Bros. Co.,* 59 F. (2d) 915 (C. C. A. 6th), certiorari denied, 287 U. S. 650.

CONCLUSION

There is no real conflict of decisions, and the decision below is plainly correct. The petition should therefore be denied.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.

SAMUEL O. CLARK, Jr.,
Assistant Attorney General.

SEWALL KEY,
MAURICE J. MAHONEY,
Special Assistants to the Attorney General.

MARCH, 1941.

APPENDIX

STATUTES INVOLVED

Revenue Act of 1917, c. 63, 40 Stat. 300:

SEC. 210. That if the Secretary of the Treasury is unable in any case satisfactorily to determine the invested capital, the amount of the deduction shall be the sum of (1) an amount equal to the same proportion of the net income of the trade or business received during the taxable year as the proportion which the average deduction (determined in the same manner as provided in section two hundred and three, without including the $3,000 or $6,000 therein referred to) for the same calendar year of representative corporations, partnerships, and individuals, engaged in a like or similar trade or business, bears to the total net income of the trade or business received by such corporations, partnerships, and individuals, plus (2) in the case of a domestic corporation $3,000, and in the case of a domestic partnership or a citizen or resident of the United States $6,000.

For the purpose of this section the proportion between the deduction and the net income in each trade or business shall be determined by the Commissioner of Internal Revenue in accordance with regulations prescribed by him, with the approval of the Secretary of the Treasury. In the case of a corporation or partnership which has fixed its own fiscal year, the proportion deter-

mined for the calendar year ending during such fiscal year shall be used.

Revenue Act of 1918, c. 18, 40 Stat. 1057:

SEC. 327. That in the following cases the tax shall be determined as provided in section 328:

(a) Where the Commissioner is unable to determine the invested capital as provided in section 326;

(b) In the case of a foreign corporation;

(c) Where a mixed aggregate of tangible property and intangible property has been paid in for stock or for stock and bonds and the Commissioner is unable satisfactorily to determine the respective values of the several classes of property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds, respectively;

(d) Where upon application by the corporation the Commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328. This subdivision shall not apply to any case (1) in which the tax (computed without benefit of this section) is high merely because the corporation earned within the taxable year a high rate of profit upon a normal invested capital, nor (2) in which 50 per centum or more of the gross income of the corporation for the taxable year (computed under section 233 of Title II) consists of gains, profits, commissions,

or other income, derived on a cost-plus basis from a Government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive.

SEC. 328. (a) In the cases specified in section 327 the tax shall be the amount which bears the same ratio to the net income of the taxpayer (in excess of the specific exemption of $3,000) for the taxable year, as the average tax of representative corporations engaged in a like or similar trade or business, bears to their average net income (in excess of the specific exemption of $3,000) for such year. In the case of a foreign corporation the tax shall be computed without deducting the specific exemption of $3,000 either for the taxpayer or the representative corporations.

In computing the tax under this section the Commissioner shall compare the taxpayer only with representative corporations whose invested capital can be satisfactorily determined under section 326 and which are, as nearly as may be, similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances.

(b) For the purposes of subdivision (a) the ratios between the average tax and the average net income of representative corporations shall be determined by the Commissioner in accordance with regulations prescribed by him with the approval of the Secretary.

In cases in which the tax is to be computed under this section, if the tax as computed without the benefit of this section is less than 50 per centum of the net income of the taxpayer, the installments shall in the first

instance be computed upon the basis of such tax; but if the tax so computed is 50 per centum or more of the net income, the installments shall in the first instance be computed upon the basis of a tax equal to 50 per centum of the net income. In any case, the actual ratio when ascertained shall be used in determining the correct amount of the tax. If the correct amount of the tax when determined exceeds 50 per centum of the net income, any excess of the correct installments over the amounts actually paid shall on notice and demand be paid together with interest at the rate of ½ of 1 per centum per month on such excess from the time the installment was due.

(c) The Commissioner shall keep a record of all cases in which the tax is determined in the manner prescribed in subdivision (a), containing the name and address of each taxpayer, the business in which engaged, the amount of invested capital and net income shown by the return, and the amount of invested capital as determined under such subdivision. The Commissioner shall furnish a copy of such record and other detailed information with respect to such cases when required by resolution of either House of Congress, without regard to the restrictions contained in section 257.

Revenue Act of 1921, c. 136, 42 Stat. 227:

SEC. 250. * * *

(b) As soon as practicable after the return is filed, the Commissioner shall examine it. If it then appears that the correct amount of the tax is greater or less than that shown in the return, the installments shall be recomputed. If the amount already paid exceeds that which should have been paid on the basis of the installments as recomputed, the

excess so paid shall be credited against the subsequent installments; and if the amount already paid exceeds the correct amount of the tax, the excess shall be credited or refunded to the taxpayer in accordance with the provisions of section 252.

If the amount already paid is less than that which should have been paid, the difference, to the extent not covered by any credits due to the taxpayer under section 252 (hereinafter called "deficiency"), together with interest thereon at the rate of one-half of 1 per centum per month from the time the tax was due (or, if paid on the installment basis, on the deficiency of each installment from the time the installment was due), shall be paid upon notice and demand by the collector. If any part of the deficiency is due to negligence or intentional disregard of authorized rules and regulations with knowledge thereof, but without intent to defraud, there shall be added as part of the tax 5 per centum of the total amount of the deficiency in the tax, and interest in such a case shall be collected at the rate of 1 per centum per month on the amount of such deficiency in the tax from the time it was due (or, if paid on the installment basis, on the amount of the deficiency in each installment from the time the installment was due), which penalty and interest shall become due and payable upon notice and demand by the collector. If any part of the deficiency is due to fraud with intent to evade tax, then, in lieu of the penalty provided by section 3176 of the Revised Statutes, as amended, for false or fraudulent returns willfully made, but in addition to other penalties provided by law for false or fraudulent

returns, there shall be added as part of the tax 50 per centum of the total amount of the deficiency in the tax. In such case the whole amount of the tax unpaid, including the penalty so added, shall become due and payable upon notice and demand by the collector.

* * * * *

(d) The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, or under section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act: *Provided,* That in the case of income received during the lifetime of a decedent, all taxes due thereon shall be determined and assessed by the Commis-

sioner within one year after written request therefor by the executor, administrator, or other fiduciary representing the estate of such decedent: *Provided further,* That in the case of a false or fraudulent return with intent to evade tax, or of a failure to file a required return, the amount of tax due may be determined, assessed, and collected, and a suit or proceeding for the collection of such amount may be begun, at any time after it becomes due: *Provided further,* That in cases coming within the scope of paragraph (9) of subdivision (a) of section 214, or of paragraph (8) of subdivision (a) of section 234, or in cases of final settlement of losses and other deductions tentatively allowed by the Commissioner pending a determination of the exact amount deductible, the amount of tax or deficiency in tax due may be determined, assessed, and collected at any time; but prior to the assessment thereof the taxpayer shall be notified and given a period of not less than thirty days in which to file an appeal and be heard as hereinafter provided in this subdivision.

If upon examination of a return made under the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or this Act, a tax or a deficiency in tax is discovered, the taxpayer shall be notified thereof and given a period of not less than thirty days after such notice is sent by registered mail in which to file an appeal and show cause or reason why the tax or deficiency should not be paid. Opportunity for hearing shall be granted and a final decision thereon shall be made as quickly as practicable. Any tax or deficiency in tax then determined to be due shall be assessed

and paid, together with the penalty and interest, if any, applicable thereto, within ten days after notice and demand by the collector as hereinafter provided, and in such cases no claim in abatement of the amount so assessed shall be entertained: *Provided,* That in cases where the Commissioner believes that the collection of the amount due will be jeopardized by such delay he may make the assessment without giving such notice or awaiting the conclusion of such hearing.

* * * * *

SEC. 336. That every corporation, not exempt under section 304, shall make a return for the purposes of this title. Such returns shall be made, and the taxes imposed by this title shall be paid, at the same times and places, in the same manner, and subject to the same conditions, as is provided in the case of returns and payment of income tax by corporations for the purposes of Title II, and all the provisions of that title not inapplicable, including penalties, are hereby made applicable to the taxes imposed by this title.

SEC. 1312. That if after a determination and assessment in any case the taxpayer has without protest paid in whole any tax or penalty, or accepted any abatement, credit, or refund based on such determination and assessment, and an agreement is made in writing between the taxpayer and the Commissioner, with the approval of the Secretary, that such determination and assessment shall be final and conclusive, then (except upon a showing of fraud or malfeasance or misrepresentation of fact materially affecting the determination or assessment thus made) (1) the case shall not be re-

opened or the determination and assessment modified by any officer, employee, or agent of the United States, and (2) no suit, action, or proceeding to annul, modify, or set aside such determination or assessment shall be entertained by any court of the United States.

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